United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL APPENDIX

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75-7175

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7175

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P/S

ERNEST KLEIN,

Plaintiff-Appellant,

-against-

SPEAR, LEEDS & KELLOGG, JAMES CRANE KELLOGG III, and RAYMOND E. GRABOWSKI,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT AND SUPPLEMENTAL APPENDIX

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BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

This is an appeal from the Memorandum Decision and Order of Henry F. Werker, D. J., dated December 2, 1974, granting the Defendants-Appellees summary judgment as to the First Cause of Action and dismissing the Second Cause of Action of the Amended Complaint (1-10 A) (*

(* References are to pages of the Appendix to Plaintiff-Appellant's Brief

Statement of the Case

This is one of a series of actions brought by plaintiff-appellant against defendants-appellees, Spear, Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski, the "Specialists" in Superior Oil stock, on the New York Stock Exchange, alleging illegal, fraudulent and deceptive manipulations by the appellees in connection with appellants' investments in the stock of Superior Oil. These activities, appellent alleges, violate various designated provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 with exclusive jurisdiction being conferred under the "1934 Act" and also constituted common law fraud under State law.

This action is one of the actions which were originally assigned to the Hon. M. I. Gurfein, D. J. pursuant to the suggestion of the U.S. Court of Appeals for the Second Circuit, for all purposes. Since Judge Gurfein was appointed to the Second Circuit Court of Appeals, all of these assigned cases were then assigned to the Hon. H. F. Werker, D. J., late in 1974.

The First Cause of Action herein alleges various frauds on the part of the defendants named therein, both Federal and common State law fraud. Each of the defendants were guilty of their own separate fraudulent acts as well as in concert with others. The appellees specifically are guilty of fraudulently manipulating the execution of the entire trade and the price of

Superior Oil stocks involved in the First Cause of Action (12-34 A).

The appellees originally moved for summary judgment in this action before D. J. Cooper who granted the motion with leave to plaintiff to amend the complaint (306 F. Supp. 743(1969).

Subsequent to service of the Amended Complaint, the appellees, among other defendants, again sought summary judgment before Judge Cooper as to the First and Third causes of action. Judge Cooper denied the motion, insofar as it pertained to the First Cause of Action of the Amended Complaint (309 F. Supp. 341 (1970).

Thereafter, in 1972, the broker-defendants, Mabon, Nugent & Co., and Weingarten & Co., moved for summary judgment on the First Cause of Action of the amended complaint upon the theory that plaintiff has not established a claim against these broker-defendants (58-A). The appelles saw fit in 1972, not to join in that motion which was ultimately granted by D. J. Motley (56-62 A).

By Notice of Motion, dated May 10, 1974, the appellees moved for the third time for summary judgment as to the First Cause of Action, pursuant to Rule 56 and to dismiss the Second Cause of Action under Rule 41 (35-95 A). The said motion was made returnable before Judge Gurfein (35-A) .

A copy of the Second Cause of Action, which was inadvertently not included in the Appendix To Plaintiff-Appellant's Brief is attached hereto as Supplemental Appendix To Plaintiff-Appellant's Brief.

Appellant submitted an affidavit with exhibits in opposition to appellee's motion and a Rule 9 (g) Statement on Behalf Of Plaintiff (107-135 A).

Appelles submitted an affidavit in reply (96-102 A).

The appellee's motion was granted by Judge Werker, by Memorandum Decision and Order dated December 2, 1974, filed December 3, 1974 (3-11 A).

Appellant appeals from said Memorandum Decision and Order (1-2 A).

POINT I

THE MEMORANDUM OPINION AND ORDER OF JUDGE MOTLEY GRANTING SUMMARY JUDGMENT IN FAVOR OF SOME OTHER DEFENDANTS IN THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT CANNOT BE USED AS GROUNDS FOR GRANTING SUMMARY JUDGMENT TO APPELLEES IN THE FIRST CAUSE OF ACTION

Judge Werker's reliance upon the decision of Judge Motley as a basis for summary judgment herein, is misplaced. A brief chronology of the events leading up to the making of the instant motion will serve to substantiate this statement.

All defendants originally moved for summary judgment in this action before Judge Cooper. His reported Opinion, Klein, v. Spear, Leeds & Kellogg, 306 F. Supp. 743, (1969) will show that the portion cited by Judge Werker on page 6 of his Memorandum Decision and Order (8-A), is taken out of context. In said Opinion by Judge Cooper,Appellant was given leave to serve and file an amended complaint (306 F. Supp. 743, 749), which he thereafter did (12-34 A).

Subsequent to the service of the Amended Complaint, the appellees, among other defendants, again sought summary judgment before Judge Cooper. In denying the motion, insofar as it pertained to the First Couse of Action, Judge Cooper held (Klein, v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 344 (1970):

> "The Kellogg defendants seek dismissal of the first cause of action as to them on the ground first that they had no direct dealings with plaintiff, dealing with plaintiff's broker instead. This argument is without any force.
>
> Second, they argue that to the extent plaintiff's deposit was not returned by his broker this loss is not traceable to them. This issue cannot now be determined, for if plaintiff is able to establish that the purchase price was too high because of manipulations by the Kellogg defendants, then he may also be able to prove that the loss suffered on resale (reflected in his loss on his deposit) was causally connected thereto.
>
> Their third argument is that plaintiff's reallegation of his claim of breach of agreement by his broker (which we held barred by collateral estoppel and which was accordingly not contested by any defendant in their amended answers) operates as an admission conclusively establishing an absence of a causal connection between the Kellogg defendants' alleged fraud and plaintiff's alleged damages. While having a certain logical attraction, this contention cannot be sustained. We reiterated above that plaintiff is not entitled to press his claim that the liquidation of his account by his broker breached an agreement he had with them because the precise question had been judicially determined to the contrary. However, having blunted his spear, we cannot also impale him upon it. We believe that to do so would be inconsistent with the permission accorded a plaintiff under the federal rules to plead facts in the alternative. See Rule 8, F.R. Civ.P.
>
> Vanden seeks summary judgment in their favor on the first cause of action on the ground that plaintiff's contentions as to them are rebutted by Vanden's own records, which are submitted as exhibits, along with an affidavit of its cashier. Plaintiff's

> own atfidavit specifically contests several of Vanden's factual allegations and records and, thus, raises genuine issues of material facts making summary disposition inappropriate. See Rule 56, F.R. Civ.P. See also, Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968)." [Emphasis supplied.]

It would appear that in making this third attempt to obtain summary judgment, the appelles want unlimited bites of the same apple, albeit Judge Cooper's second Opinion and Order, which established the law of the case on this point and draws a clear distinction between the role of the brokers,(the Mabon-Weingarten defendants) and the role of the "Specialists", the appellees,in regard to the transactions involved.

Appellant respectfully submits that Judge Motley's Opinion perforce is limited to the sole issue raised by the moving papers then before her, i.e., did the broker defendants conspire to manipulate the price of Superior Oil stock? Her finding in favor of the broker defendants only,does not and cannot encompass the appellees as specialists in Superior Oil stock who are concededly governed by other rules and other standards. The factual material and documentation set forth by appellant in his affidavit and exhibits in opposition to the appellee's motion (107-135 A), preclude the granting of summary judgment as matter of law. Likewise, the issues of fact which are raised by appellant in his opposing affidavit preclude the granting of summary judgment as a matter of law.(107-135 A).

A careful reading of the allegations of the First Cause of Action of the Amended Complaint (12-34 A) and of the appellant's

affidavit in opposition to the motion herein (105-135 A) establishes beyond any doubt that the fraudulent claims asserted against the appellees -"specialists", are entirely different from the claims asserted against the defendant-brokers involved, who were successful in obtaining summary judgment before Judge Motley.

First, as to the claim of appellees'failure to deliver the stock on the settlement date, please see paragraph 47 of the Amended Complaint (21 A), paragraphs 5 and 10 of appellant's affidavit in opposition (109, 111 A) and exhibits 3 and 4 annexed to said affidavit in opposition (119-132 A).

Second, as to the claim of appellee's trade manipulations of the stock involved, please see paragraphs 44, 45, 70, 71, 72,and 73 of the Amended Complaint (21,27-27 A), and paragraphs 6 and 7 of appellant's affidavit in opposition (109-110 A).

Third, as to the claim of price manipulations by the appellees relating to the stock involved, please see paragraphs 74-82, 93-104 of the Amended Complaint (27-28,93-104 A), and paragraphs 8, 9 and 11 of appellant's affidavit in opposition (110-111 A).

All of these claims and allegations distinguish appellant's action against the appellees-specialists from the claims and allegations against the broker-defendants.

All of this apparently was misapprehended or overlooked by the District Judge below.

It is also significant to note that the District Court below gratuitously delved into its own definition of the meanings of "round lot" and "odd lot" relating to the Superior Oil stock involved in this action and interpreted that a trade in 10 shares was deemed an "odd lot" since any transaction less than 100 shares was an "odd lot" (5-6 A).

Appellant maintained that,at all times relevant to this action, each "round lot" transaction consisted of only 10 shares of Superior Oil stock and no more; that any trade on the New York Stock Exchange in less than 1o shares in Superior stock was deemed and treated as an "odd lot" (26-A). The appellees, "specialists" in Superior Oil stock, neither denied nor took issue with such contention of appellant.

Disregarding plaintiff-appellant's allegations in paragraphs 71-72 of the Amended Complaint, the District Court below stated that "... diversionary tactics"... were employed "by plaintiff in his affidavit in opposition where he asserts,"It should be noted that in this stock alone, 10 shares, because of the price of the security were deemed a 'round lot'" (5-A).

On the argument of this appeal, appellant will respectfully ask leave of this Court to submit the New York Stock Exchange's own position that establishes conclusively the facts relating to "odd lots " and "round lots" in Superior Oil stock, as alleged in the Amended complaint and as stated in plaintiff-appellant's affidavit referred to hereinabove. The criticism by the District Court below of appellant in this regard was unwarranted.

POINT II

DISMISSAL OF THE SECOND CAUSE OF ACTION OF THE AMENDED COMPLAINT WAS UNWARRANTED PURSUANT TO RULE 41,F.R.C.P. AS A MATTER OF LAW AND WAS AN ABUSE OF DISCRETION BY THE COURT BELOW

Judge Werker dismissed the Second Cause of Action as to appellees upon the grounds (a) that appellant has abandoned his claims against them in the instant action by instituting a subsequent action -Klein v. Bache & Co., et al., 71 Civ. 20- which asserts identical claims against appellees, and (b) by failing to diligently prosecute the claims asserted in the Second Cause of Action (8-11 A).

Appellant respectfully submits that his affidavit in opposition set forth factually the reasons for instituting the Bache action and he had no reason to abandon the Second Cause of Action of the Amended Complaint herein; that there was no reason to sever the Second Cause of Action and prosecute it separately from the other actions against the appellees-specialists which were assigned to a single judge (Judge Gurfein, and thereafter to D.J. Werker) for all purposes,including trial (113-116 A).

In his Memorandum Decision and Order, Judge Werker states:

> "Plaintiff has had this Second Cause of Action pending since he amended his complaint under date of August 21, 1969. It was stayed by this court on January 13, 1972 until disposition of the counterpart action in the Kings County Supreme Court." (8-9 A).

Appellant submits that this Second Cause of Action was never stayed, and it was an error by Judge Werker to make such statement.

As stated in appellant's affidavit in opposition, Pre-trial proceedings in all appellant's actions against the appellees-specialists in the District Court below have been completed; that in the interest of justice and based upon the format already established by the District Court below this action should be consolidated with the other pending "specialists" cases for trial; that no prejudice could result to appellees from such consolidation of actions (113-116 A).

All the above shows that the Memorandum-Decision and Order of the court below was an error as a matter of law and abuse of discretion in the granting the apeellees' motion.

CONCLUSION

For the reasons set forth herein the Memorandum Decision and Order of the Hon. Henry F. Werker, D. J. should be reversed and the appellees motion denied in all respects with costs to appellant.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

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* * *

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS, "SPEAR", "GRABOWSKI," "KELLOGG" and "THOMSON"

111. Plaintiff repeats and realleges the allegations set forth in paragraphs "1" through "110" inclusive of this complaint, as if more fully set forth herein.

112. That at all times relevant thereto, one Broad and Wall Corporation (hereafter called "BROAD CORP."), was a domestic corporation, engaged as a factor in the business of lending moneys and in the financing of investments in securities, by making loans against collateral pledged with it, with its principal place of business located in the City, State and Southern District of New York.

113. That, at all times relevant thereto, and prior to January 2, 1963, "BROAD CORP." opened and maintained an account with defendant "THOMSON," under No. 52-10810, and under the following name and description: "The Broad & Wall Corporation 101 Park Ave., New York 17, New York, att.: Mr.

Julius G. Berens President."

114. That, upon information and belief, said "BROAD CORP." on behalf of its customers and/or pledgers, employed the defendant "THOMSON," as agent and fiduciary, for the execution of purchase or sales orders, and for placing so-called "Stop-loss orders" on the securities of its customes and/or pledgors, on the New York Stock Exchange.

115. That, upon information and belief, defendant "THOMSON" well knew, or had sufficient reason to know, that the security transactions in said account for "BROAD CORP." were in fact for customers and/or pledgors, and undisclosed principals of "BROAD CORP." who pledged their securities as collateral, against loans obtained from said "BROAD CORP.," and that such securities were in fact not owned by said "BROAD CORP."

116. That, upon information and belief, defendant "THOMSON" knew, or had reason to know, that the "stop-loss orders" or other orders placed by "BROAD CORP." with it, were for securities owned by customers and/or pledgors of such undisclosed principals of "BROAD CORP." as aforesaid, which securities were held by "BROAD CORP." as collateral against loans made by "BROAD CORP." to such customers and/or pledgors.

117. That defendant "THOMSON" knew that "BROAD CORP." had extended loans to its customers on such securities pledged.

118. That the account of "BROAD CORP." with defendant

"THOMSON" was an active trading account, and defendant "THOMSON" kenw, or had enough reason to know, that the trades in the securities in said account were for customers of "BROAD CORP."

119. That prior to January 8, 1963, plaintiff had pledged with "BROAD CORP." 50 shares of "SUPERIOR" as collateral against loans made to him by "BROAD CORP."

120. That, upon information and belief, on or about January 2, 1963, "BROAD CORP." employed the defendant "THOMSON" to place and enter "stop-loss" orders on the plaintiff's 50 shares "SUPERIOR" on the New York Stock Exchange, at the following "stop-loss" prices:

(a) 10 shares at $1,160.00 per share stop-loss;

(b) 10 shares at $1,155.00 per share stop-loss;

(c) 10 shares at $1,150.00 per share stop-loss;

(d) 10 shares at $1,145.00 per share stop-loss; and

(e) 10 shares at $1,140.00 per share stop-loss.

121. That, upon information and belief, defendant "THOMSON" accepted said "stop-loss" orders and, in turn, employed and entrusted the said specialists, defendants, "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI" with the handling of said "stop-loss" orders.

122. That, upon information and belief, the defendant "SPEAR," and/or defendant "GRABOWSKI," and/or "KELLOGG," accepted these "stop-loss" orders as "THOMSON's" broker, and/or agent,

for a consideration of receiving fees, for such services, if and when such stop-loss orders were executed.

123. That, upon information and belief, it was the duty and obligation of defendants "SPEAR," and/or "GRABOWSKI", and/or "KELLOGG", to maintain an orderly market in "SUPERIOR", to try to make every effort in order to protect the said 50 shares "stop-loss" "SUPERIOR" from such other transactions in "SPEAR's" and/or "GRABOWSKI's," and/or "KELLOGG's" own accounts, so that such transactions in their own accounts will not result in putting into effect the "stop-loss" orders placed on behalf of plaintiff, and thereby converting such orders into market orders.

124. In addition, upon information and belief, not only did "SPEAR," and/or "GRABOWSKI", and/or "KELLOGG" touch off 20 shares of "stop-loss" "SUPERIOR" by their own transactions, but they, themselves, purchased the said 20 shares, for their own account, at less than the prevailing market at the time, of disinterested parties dealing at arms length.

125. Upon information and belief, the defendants "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI", instead of trying to protect the interests of plaintiff, as their undisclosed principal and ownerof the 50 shares of "SUPERIOR", in breach and in violation of their fiduciary duties and

responsibilities to the general public and to plaintiff, as an undisclosed principal, manipulated the price in "SUPERIOR" stock to the downside and created a fictitious lower price for "SUPERIOR" in order to enable them to pocket 20 shares at much lower prices than the then prevailing market in "SUPERIOR", at the time, on the New York Stock Exchange, for their own account and for their own benefit and interests, and to the damage of the plaintiff.

126. That in furtherance of such manipulation, as aforesaid, on the 2nd day of January, 1963, defendants "SPEAR", and/or "KELLOGG," and/or "GRABOWSKI," consummated fictitious transactions with themselves at fictitious lower prices for "SUPERIOR", which prices were created by themselves, thereby enabling "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI", to obtain 20 of the 50 shares of plaintiff's "SUPERIOR" which were entered and registered in defendants "SPEAR's, or "KELLOGG's" or "GRABOWSKI's" book, as "stop-loss" orders, for their own account, at a price at $1,155.00 per share, when in fact the actual prevailing market for "SUPERIOR" stock at that time, was considerably higher on the New York Stock Exchange.

127. That none of the defendants "SPEAR,""KELLOGG" or "GRABOWSKI," nor the defendant "THOMSON" communicated or notified plaintiff or"BROAD CORP." of the intentions of the defendants "SPEAR," or "KELLOGG," or "GRABOWSKI", to acquire plaintiff's 20 shares "SUPERIOR" for their own account for the said low prices.

128. That, upon information and belief, "SPEAR", "KELLOGG" and "GRABOWSKI" and the defendant "THOMSON" did not ask their known principal "BROAD CORP." or the undisclosed principal, the plaintiff herein, for consent to such transactions as aforesaid.

129. Upon information and belief, the aforementioned "BROAD CORP." never authorized, nor consented to the acquiring of said 20 shares by defendants "SPEAR", and/or "KELLOGG," and/or "GRABOWSKI" for their own account.

130. Upon information and belief, on January 2, 1963, at the time when the first sales transaction on the New York Stock Exchange in "SUPERIOR" stock was executed, at $1,155.00 per share, it was not made and executed between disinterested third parties, but were manipulated, made and/or arranged by and between the defendants "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI" and/or "THOMSON" on behalf of defendant "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI", and/or on behalf of defendant "THOMSON," for the purpose of creating and placing in effect a fictitiously low price of $1,155.00 per share, and concealing the defendants' specialists' "SPEAR," and/or "KELLOGG", and/or "GRABOWSKI", intentions to take for themselves the said said 20 shares by putting in effect the stop-loss order of $1,160.00 and $1,155.00 per share.

131. That, on the 8th day of January 1963, said

"BROAD CORP." placed an order with defendant "THOMSON" to sell plaintiff's 30 shares of "SUPERIOR" at the market, on the New York Stock Exchange.

132. That, upon information and belief, the defendants "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI", instead of trying to protect the interests of plaintiff, as their undisclosed principal and owner of the said 30 shares of "SUPERIOR", in breach and in violation of their fiduciary duties and responsibilities to the general public and to plaintiff, as an undisclosed principal, manipulated the price of "SUPERIOR", stock to the downside and created a fictitious lower price for "SUPERIOR," in order to enable them to pocket these 30 shares at much lower prices than the then prevailing market value was in "SUPERIOR," on the New York Stock Exchange, for their own account, and for their own benefit and interests, and to the damage of plaintiff.

133. Upon information and belief, on January 8, 1963 at the time when the first sales transaction on "SUPERIOR" on the New York Stock Exchange was executed at $1,130.00 per share, it was not made and executed between disinterested third parties but were manipulated, made and/or arranged by and between the defendants "SPEAR," and/or "KELLOGG," and/or "GRABOWSKI," and/or "THOMSON" and/or others, on behalf of defendant "SPEAR" and/or "KELLOGG," and/or "GRABOWSKI," and/or on behalf of

defendant "THOMSON" and/or its employees or associates, for the purpose of effectuating the intentions of the specialists, "SPEAR", and/or "KELLOGG," and/or "GRABOWSKI," to take for themselves the said 30 shares of "SUPERIOR", at $1,130.00 per share, which was a manipulated low price, and was not the prevailing market price on that day and at that time, for "SUPERIOR" stock.

134. By reason of the foregoing acts of the aforesaid defendants, plaintiff sustained damages in the sum of FORTY-FIVE THOUSAND ($45,000.00) DOLLARS.

135. In addition, as a result of the wrongful act and violations of the aforesaid defendants, plaintiff requests punitive damages in a sum to be assessed by the Court.

* * *

STATE OF NEW YORK)
SS:
COUNTY OF KINGS)

CAROLEE RUSSO, being duly sworn, deposes and says:

Deponent is not a party to the within action, is over 18 years of age and resides at 2951 Ocean Avenue, Brooklyn, New York.

On April 29, 1975 deponent served two copies of the within Brief For Plaintiff-Appellant And Supplemental Appendix upon Reavis & McGrath, Esqs., attorneys for Defendants-Appellees in this action, at 1 Chase Manhattan Plaza, New York, New York, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Carolee Russo

Carolee Russo

Sworn to before me this
29th day of April 1975.

Harry L Klein

HARRY L. KLEIN
NOTARY PUBLIC, State of New York
No. 24-[illegible]-25
Qualified in [illegible] County
Commission Expires March 30, 19 77